

CHEN CHONG FAT & ORS

a

v.

CHUA THIAN TENG & ANOR

HIGH COURT MALAYA, ALOR SETAR

b

ARIFIN ZAKARIA J

[CIVIL SUIT NO: 22-70-87]

19 OCTOBER 2000

ARBITRATION: *Stay of proceedings - Application - Affidavit supporting application - Failure to state applicant was willing and ready to do all things necessary for the purpose of arbitration - Whether fatal to application*

c

CIVIL PROCEDURE: *Writ of summons - Renewal - No endorsement in Form 5 - Rules of the High Court 1980 (RHC), O. 6 r. 7(3) - Whether service of renewed writ without endorsement valid - Whether curable under O. 2 r. 1(2) RHC - Whether irregularity prejudicial to other party*

d

This was an appeal against the decision of the senior assistant registrar dismissing the 1st defendant's application for an order that the service of the plaintiff's writ and the amended statement of claim be set aside and for a further order that all proceedings be stayed pursuant to s. 6 Arbitration Act 1950. The 1st defendant contended that the writ which was served on him by substituted service did not have the endorsement in Form 5 pursuant to O. 6 r. 7(3) Rules of the High Court 1980 (RHC). Therefore, the service was invalid. He also contended that the proceedings ought to be stayed pursuant to s. 6 Arbitration Act 1952 and cl. 16 of the agreement between the plaintiff and the 1st defendant.

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Held:

[1] The omission to endorse one of the notice of renewal on the writ as required by O. 6 r. 7(3) RHC was an irregularity which was curable under O. 2 r. 1(2) RHC. This was because the omission did not prejudice the defendant.

g

[2] The failure of the 1st defendant to state in his affidavit supporting the application for stay of proceedings that he was willing and ready to do all things necessary for the purpose of the arbitration was fatal to his application.

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[Appeal dismissed with costs.]

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a Case(s) referred to:

AR Fernandez & Ors v. National Union of Bank Employees [1986] 1 CLJ 456 (**fol**)

Arab Malaysian Credit Bhd v. Tan Seong Meng [1995] 1 CLJ 773 (**refd**)

Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor [1997] 3 CLJ 305 (**fol**)

Lee Brothers Construction Co v. Teh Teng Seng Realty Sdn Bhd [1988] 1 MLJ 459 (**refd**)

b *Lim Yoon Loy & Ors v. Lee Lan* [1990] 2 MLJ 425 (**refd**)

Malayan Banking Bhd & Anor v. Swasta Jaya Sdn Bhd [1990] 1 CLJ 1096 (**refd**)

Legislation referred to:

Arbitration Act 1952, s. 6

Rules of the High Court 1980, O. 2 r. 1(2), O. 3 r. 5, O. 6 rr. 1(2), 7(2), (3)

c *For the plaintiff - C Megalai; M/s Meg Nacha & Co*

For the defendant - Gregory Dicom; M/s YS Woo & Proctor

Reported by Izzaty Izzuddin

d JUDGMENT**Arifin Zakaria J:**

This is an appeal against the decision of the learned SAR in rejecting the 1st defendant's application dated 2 May 1999 (encl. 78) for the following orders:

- e**
- 1) that the service of the plaintiff's writ dated 28 November 1987 and the Amended Statement of Claim on the 1st defendant be set aside pursuant to O. 12 r. 7 of the Rules of the High Court 1980; and
 - 2) that all proceedings herein be stayed pursuant to s. 6 of the Arbitration Act 1950;
- f**
- 3) costs be paid by the plaintiffs; and
 - 4) further or other reliefs as this Honourable Court deems fit and proper.

g The application is supported by the affidavit of the 1st defendant affirmed on 30 April 1999 (encl. 79). The grounds in support of this application appear in paras. 12, 13 & 14 of the said affidavit which read as follows:

12. The plaintiff has failed to renew the writ from 28 November 1991 up to date of service on my solicitors *ie*, 13 April 1999.
- h**
13. Hence I am advised by my solicitors that the service of the writ should be set aside as the writ had expired on 28 November 1991.
 14. Further and in the alternative, I pray that these proceedings be stayed as the agreement between the plaintiff and myself dated 26 December 1979 has an arbitration clause at cl. 16 thereof. A copy of the agreement dated 26 December 1979 is now shown to me and marked as exh. "C5."
- i**

Essentially the 1st defendant is alleging that when the writ was served on his solicitors on 13 April 1999 the writ had long since expired and secondly these proceedings ought to be stayed for the dispute to be referred to arbitration pursuant to cl. 16 of the agreement between the plaintiff and the defendant dated 26 December 1979 (“the agreement”).

Validity Of The Writ

It is not in dispute that since its issuance the writ was renewed on three occasions between 1988 to 1991 and the writ was served on the 1st defendant by substituted service sometime in 1991.

The statement of claim was subsequently amended pursuant to court order dated 14 September 1992. The writ and the amended statement of claim was then served on the 1st defendant’s solicitors on 13 April 1999. The counsel for the 1st defendant contended that the writ which was served on the 1st defendant’s solicitors on 13 April 1999 is invalid on the ground that there was no renewal of the said writ between 28 November 1991 to the date of service of the said writ on the 1st defendant’s solicitors. Cik C. Megalai for the plaintiff argued that the writ need not be renewed subsequent to 28 November 1991 since the writ had already been served on the 1st defendant by way of substituted service pursuant to court order dated 23 December 1990. Therefore when the writ was served on the 1st defendant’s solicitors together with the amended statement of claim on 13 April 1999 it was a valid writ. She contended that a writ once served on the defendant need not be renewed any longer. The contention of the counsel for the plaintiff seems to find support in the provisions of O. 6 r. 7(2) of the Rules of the High Court 1980 (“the RHC”) which reads as follows:

(2) **where a writ has not been served on a defendant**, the court may by order extend the validity of the writ from time to time for such period, not exceeding 12 months at any one time, beginning with the day next following that on which it would otherwise expire, as may be specified in the order, if an application for extension is made to the court before that day or such later day (if any) as the court may allow. (emphasis added)

Face with that argument counsel for the 1st defendant then sought to challenge the writ on the ground that when it was served on the 1st defendant by substituted service it did not comply with O. 6 r. 7(3) of the RHC which states that:

(3) Before a writ, the validity of which has been extended under this rule, is served, it must be marked with an official stamp in Form 5 showing the period for which the validity of the writ has been so extended.

He contended that the writ that was served on the 1st defendant only bears two endorsements in Form 5. Counsel for the plaintiff conceded that there are only two endorsements on the writ for periods 28 November 1988 to 27

- a* November 1989 and 28 November 1990 to 27 November 1991. Thus, there is no endorsement for the period 28 November 1989 to 27 November 1990. However, the plaintiff's counsel informed the court the writ was in fact renewed for the said period but somehow it was not endorsed as required by O. 6 r. 7(3) of the RHC. She then went on to submit that the said omission
- b* is not fatal as to render the writ to be declared invalid. Upon perusal of the court's file I find there was indeed an application made by the plaintiff for renewal of the writ *vide* encl. 20, and an order in terms of the application was granted by the learned SAR on 7 January 1990. However, this order for renewal has not been endorsed on the writ as required by O. 6 r. 7(3) of the
- c* RHC. The learned counsel for the plaintiff argued that the omission here is a mere irregularity and urged upon the court to use its discretion to have it cured under O. 2 r. 1(2) of the RHC.

- In this case I don't think it could be denied that the writ was in fact renewed by order of court. The only defect in the writ was the omission to have the
- d* writ endorsed as required by O. 6 r. 7(3) of the RHC. In this regard I think we ought to consider the purpose of the endorsement. To me, it is merely to give notice to the defendant that the writ had been duly renewed. The failure to give such a notice should logically not render, an otherwise perfectly valid writ, invalid or the service of it be declared invalid. More so in this case where
- e* the writ does carry the endorsement for the period 28 November 1990 to 27 November 1991 during which the writ was served on the 1st defendant, albeit by substituted service. In any event a search in the court file by the 1st defendant would certainly reveal that the writ had in fact been renewed on three occasions until it was eventually served on the 1st defendant. In *Lim*
- f* *Yoon Loy & Ors. v. Lee Lan* [1990] 2 MLJ 425 where the notice of appeal was not served on the respondent although it was attached to the motion by which the appellants applied for stay and this was served on the respondent's solicitors, there the court held that the failure to serve is an irregularity and the court had the unfettered discretion under O. 3 r. 5 of RHC to extend the time. See also *Malayan Banking Bhd. & Anor v. Swasta Jaya Sdn. Bhd.* [1990]
- g* 1 CLJ 1096, where judgment entered in default of appearance but in actual fact appearance had been entered but not registered by the registry in the cause book was held to be a mere irregularity. In considering this issue I take guidance from what was said by Mohd. Azmi FCJ in the case of *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 3 CLJ 305 at p. 315:

- h* ... the discretion available to this court to cure irregularities under O. 2 r. 1(1) of the RHC read together with s. 69(4) of the Courts of Judicature Act 1964 as well as s. 101 of the same Act which allows this court to discount 'any error, defect or irregularity whether in the decision or otherwise, not affecting the merits or the jurisdiction of the court', should only be undertaken by the
- i* court in the absence of prejudice.

Turning to the present case I do not see how this irregularity in the writ could be said to have prejudice the defendant. The defendant could easily have made the necessary search in the court's file to see if the writ had in fact been renewed. It should always be remembered that a rule of court should not be construed as to produce unfairness or a manifest injustice. (See *Arab Malaysian Credit Bhd. v. Tan Seong Meng* [1995] 1 CLJ 773). For the above reasons I hold that the omission to endorse one of the notice of renewal on the writ as required by O. 6 r. 7(3) of the RHC is an irregularity which is curable under O. 2 r. 1(2) of the RHC.

I therefore, dismiss the 2nd defendant's application to have the writ set aside on the aforesaid ground.

Application For Stay Of Proceedings

The second prayer of the appellant is for an order that all proceedings herein be stayed pursuant to s. 6 of the Arbitration Act 1952 ("the Act"). The appellant relies on cl. 16 of the agreement (exh. C5) in support this application, which provides that:

16. All disputes and questions whatsoever which may arise between the Landowners and the Developer touching this Agreement or the construction or application thereof or any clause or thing herein contained or as to any way relating to the said land or the rights or any party under this Agreement shall be referred to a single arbitration if the parties shall agree upon one otherwise to two arbitrations one to be appointed by each party to the difference in accordance with and subject to the provisions of Arbitration Act 1952 or any statutory modification, thereof for the time being in force.

Whereas s. 6 of the Act provides that:

6. Power to stay proceedings where there is submission to arbitration.

If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

The approach to be adopted in considering an application of this nature is well settled. In *Lee Brothers Construction Co. v. Teh Teng Seng Realty Sdn. Bhd.* [1988] 1 MLJ 459 Peh Swee Chin J (as then was) at p. 460 summarised the principles to be adopted in the following words:

- a* It would be necessary to restate a few relevant basic principles of stay of action on ground of arbitration. Not only should there be a valid arbitration agreement, the applicant should apply for a stay before taking any step in the proceedings after appearance, and that applicant must satisfy the court that he was, at the time when proceedings were commenced, and still remains, ready and willing to do all things necessary for the proper conduct of the arbitration. Please see
- b* s. 6 of the Arbitration Act 1952. These few principles require elaboration later in regard to the negative requirement of not taking any other step in the proceedings after appearance.
- In the face of such an application from a defendant, the plaintiff will have the onus of showing that the matter ought not to be referred to arbitration.
- c* Please see the old case of *Drouth v. the Ship*, “Paul Donmer”, and if the Plaintiff fails to discharge that onus, the court will assume there is no sufficient ground for not granting a stay. In exercising its discretion, it is the *prima facie* duty of the court to act upon such an arbitration agreement: per Lord Selbourne LC in *Willesford v. Watson*.
- d* On the question of the willingness of the defendant to submit to arbitration the learned judge had this to say:
- It was fourthly submitted that a bold assertion about willingness to do everything necessary for the proper conduct of the arbitration is not sufficient.
- e* Jessal MR in *Percy v. Young* made an observation, though, **obiter**, that the lower court should have required an affidavit to be produced on willingness or readiness to refer to arbitration. In my view, an affidavit ought to be ordinarily sufficient as to such willingness or readiness on the part of the defendant to refer to such tribunal of its choice.
- f* In *AR Fernandez & Ors. v. National Union of Bank Employees* [1986] 1 CLJ 456, the Supreme Court held, *inter alia*, that the respondent Union in that case has not complied with s. 6 of the Act, in that it has not stated in its affidavit that it was ready and willing to do all things necessary for the proper conduct of arbitration. The learned judge they said should not therefore have made an order for reference to arbitration. Similarly in our case the 1st defendant failed
- g* to state in his affidavit supporting this application (encl. 79) that he is willing and ready to do all things necessary for the purpose of the arbitration. I am of the view that such a failure is fatal to the 1st defendant’s application. I therefore dismiss the 1st defendant’s application for a stay of the proceedings herein pending reference to arbitration.
- h* For the above reasons the 1st defendant’s application is dismissed with costs to be taxed unless otherwise agreed between the parties.
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